ALLAN KINSEY & ANOR v. SUNWAY RAHMAN PUTRA SDN BHD & ANOR; DEKON SDN BHD (THIRD PARTY)

HIGH COURT MALAYA, SHAH ALAM
PRASAD SANDOSHAM ABRAHAM J
[SUIT NO: 22NCVC-971-2011]
16 APRIL 2015

CONTRACT: *Breach – Agreement – Sale and purchase agreement of bungalow – Purchaser highlighted patent defects to developer – Discovery of cracks – Site inspection report revealed that cracks attributed to poor workmanship and construction errors – More cracks appeared at same and different locations despite repairs – Claim against developer for breach of contract for failing to build property in good and workman-like manner*

TORT: *Negligence – Professional negligence – Discovery of cracks on bungalow – Engineer assigned by developer to carry out site inspection – Site inspection report revealed that cracks attributed to poor workmanship and construction errors – More cracks appeared at same and different locations despite repairs – Claim against structural engineer for being negligent in his role, duties and responsibilities to developer*

The plaintiffs purchased a bungalow ('the said property') which was built by the first defendant. During a joint inspection with the first defendant's representative prior to taking delivery of vacant possession of the said property, the plaintiffs noticed patent defects and the same was highlighted to the first defendant in October 2005. In early 2006, the plaintiffs discovered cracks and this was informed to the first defendant who then arranged for the second defendant to do a site inspection. Based on the second defendant's report, the cracks were attributable to, *inter alia*, poor workmanship and construction errors. Despite being repaired, more cracks appeared at the same location and also other locations. In March 2006, the plaintiffs decided to build an extension to the original bungalow. The cracks continued to recur and new cracks developed in the bungalow. The plaintiffs claimed against (i) the first defendant for alleged breach of cl. 14 of the principal agreement for failing to build the said property in a good and workman-like manner; and (ii) the second defendant for being negligent in his role, duties and responsibilities to the first defendant.

Held (dismissing claim against both defendants with no order as to costs):

(1) All the evidence and documents pointed to the irresistible conclusion that the said property had been constructed in a good and workman-like manner in accordance with the relevant laws and regulations. The first defendant had delivered vacant possession of the said property with, *inter alia*, the support of a certificate signed by the first defendant's architect certifying that the said property had been duly constructed and completed in accordance with all relevant acts, by-laws and regulations

and all conditions imposed by the appropriate authority in respect of the issuance of the certificate of fitness for occupation had been duly complied with. (para 33)

(2) The plaintiff's expert reports, whilst dealing with the issue of cracks, did not focus on the first defendant's obligations under cl. 14. While the findings might be relevant in support of a plea for breach of duty, since the plaintiff relied, by way of its pleading, on a breach of cl. 14 of the principal agreement, the report was of little assistance to the plaintiff. The plaintiff in its pleadings raised a plea of implied terms to be read into the principal agreement but have failed to expressly plead particulars of these implied terms that they were relying on. (paras 34 & 35)

(3) If in this case the officious bystander were to be asked whether these terms were to be implied in the principal agreement, the answer would be that so long as the said property was built according to the building plans and specifications set out in the principal agreement and certificate of fitness for occupation had been issued, there would be no need to imply terms into the principal agreement. The certificate of practical completion had been issued which implied compliance with cl. 14 of the principal agreement. A plea of implied terms could not be sustained in a statutory sale and purchase agreement. (paras 36 & 37)

(4) The fact whether or not the second defendant had been negligent in his role, duties and responsibilities to the first defendant had no bearing to the plaintiff's claim as no duty of care was owed by the second defendant in that regard. (para 40)

Case(s) referred to:

Chan Chor Tng & Ors v. Housing & Urban Development Co (Pte) Ltd [1980] 1 LNS 101 ***(refd)***

Kiing Teck Hoon v. T-Point Aluminium Sdn Bhd & Ors [2007] 1 LNS 281 HC ***(refd)***

Ng Hean Yin & Ors v. Ken Property Sdn Bhd [2013] 1 LNS 1424 HC ***(refd)***

Pentadel Sdn Bhd v. TPPT Sdn Bhd [2011] 1 LNS 1283 HC ***(refd)***

Plant Construction Limited v. JMH Construction Services Limited and Another (2000) 2 TCLR 513 ***(refd)***

SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***

Teh Khem Ori & Anor v. Yeoh & Wu Development & Ors [1995] 3 MLRM 875 ***(dist)***

For the plaintiffs - James Edwin (Colin Victor with him); M/s James Edwin & Co

For the 1st defendant - John Clark (William Soon with him); M/s Sidek Teoh Wong & Dennis

For the 2nd defendant - Paul Kwong (Allison Ong with him); M/s Azman Davidson & Co

For the 3rd party - Lesley Lim (HW Yip with her); M/s Richard Wee & Yip

Reported by Najib Tamby

JUDGMENT

Prasad Sandosham Abraham J:

[1] This suit was heard over a period of time and was finally concluded on the 2 July 2014, wherein the matter was deferred for decision to enable all parties to file in their respective written submissions and replies. After close of submissions, and having given due consideration to the same and the pleadings and after having evaluated the oral testimony of witnesses and undertaking a scrutiny of all documents of the respective experts and their reports, the court delivered judgment on 10 April 2015 wherein the court ordered as follows:

(a) Plaintiffs' claim against both defendants was dismissed with no order as to costs;

(b) The second defendant's third party action was dismissed with no order as to costs;

I now append my grounds for so doing.

Material Facts Germane To The Dispute

[2] The plaintiffs purchased a bungalow and the land (the said property) on a lot situated at No. 13, Jalan BRP 3/3 Sunway Rahman Putra, Sungai Buloh, Selangor, which was built by the first defendant. The reinforced concrete retaining wall (RCRW) was built by the first defendant as part of the said property.

[3] The plaintiffs are now the registered owners of the said property. Vacant possession was deemed delivered to the plaintiffs by the first defendant on 16 September 2005.

[4] At the plaintiffs' and the representative of the first defendant's joint inspection in October 2005 prior to the plaintiffs taking delivery of vacant possession of the said property from the first defendant, the plaintiffs noticed and highlighted the patent defects of the said property.

[5] The plaintiffs discovered cracks in the bungalow in early 2006, before any renovations or extension works commenced.

[6] The plaintiffs informed the first defendant who arranged for the second defendant to do a site inspection. The second defendant prepared a report (bundle B3 pp. 222-233) based on its site visit on 17 February 2006. In that assessment report found at (bundle B3 pp. 225-228), the second defendant attributed the cracks to:

(i) Poor workmanship;

(ii) Poor compaction;

(iii) Movement of the RCRW causing subsidence of ground at the affected area;

(iv) Construction errors; and

(v) Subsidence of slab due to settlement of back filed ground.

[7] The cracks were repaired.

[8] However, more cracks appeared subsequently at the same location (previously repaired) and at other locations.

[9] Further site inspections were made and reports issued by the second defendant upon the request of the first defendant in 2006.

[10] These are found at (bundle B2 pp. 109-110) (2 June 2006) and (bundle B3 pp. 234-246) (November 2006).

[11] Attempts were made to repair these cracks but the cracks subsequently recurred.

[12] There were also vertical cracks in the RCRW in November 2006 (bundle B3 p. 236) which the second defendant attributed to "Differential movement between two stretches of retaining wall". At bundle B2 p. 239, the second defendant says, "These may be due to the following reasons":

(i) Present (*sic*) (Presence) of hydrostatic pressure, since weep holes were not installed to end stretch of RCRW to discharge the rain water and as such cause excessive later (*sic*) (lateral) pressure as compared with the other stretch of wall which constructed with weep holes;

(ii) Additional lateral pressure that was induced recently from the backfill earth above the original ground level and construction joint not properly done ...

[13] Again, the second defendant had attributed the crack in the RCRW to the poor workmanship and negligent supervision of the first defendant's servants and or agents.

[14] Meanwhile in March 2006, (ie, after the cracks were discovered in the bungalow), a contractor engaged by the plaintiffs started work to build an extension (the extension) to the original bungalow.

[15] The plaintiffs engaged ArchiCentre Sdn Bhd, (principal Ar Dr Tan Loke Mun – DW3), as the architect for the extension. Dr Tan is the same architect who had previously been engaged by the first defendant to design and supervise the construction of the bungalow;

[16] Similarly, the plaintiffs engaged the second defendant (engineer in charge Ir Ng Yiw Lai - D2W2/DW5) for the design and supervision of the civil and structural works for the extension, the same engineer who was previously engaged by the first defendant to design and supervise the civil and structural works for the said property and the RCRW.

[17] The cracks continued to recur and new cracks developed in the bungalow. More reports were prepared by the second defendant – Bundle B2 p. 135 (5 February 2007), bundle B2 p. 147 (9 March 2007), bundle B2 p. 151 (10 April 2007), bundle B2 p. 155 (29 May 2007); and bundle B2 p. 166 (23 December 2009).

[18] From the letter appearing at bundle B2 p. 155, the plaintiffs were aware that the second defendant's monitoring of the RCRW had shown that the RCRW suffered cracks ranging from 0.16mm to 0.86mm. Although the second defendant said that continued monitoring would take place, the plaintiffs did not receive any further report from the first defendant or the second defendant (Q&A 34 WSPW1).

The Plaintiffs' Pleaded Case

[19] The plaintiffs is and were at all material times purchasers of the said property.

[20] The first defendant was a licensed developer under the Housing Development (Control and Licensing) Act 1966 and had a registered office at Level 16, Menara Sunway, Jalan Lagoon Timur, Bandar Sunway, 46150 Petaling Jaya, Selangor Darul Ehsan. The first defendant was the developer of the project where the said property was situated .

[21] The second defendant is and was the consultant civil and structural engineer appointed by the first defendant for the project.

[22] The plaintiffs purchased the said property for a total purchase price of RM1,584,720 only from a vendor Muhammad Shaarin bin Abdullah and by a Deed of Novation Cum Assignment dated 28 January 2004 (the deed) the plaintiffs agreed to covenant and undertook to perform and fulfil and observe all the terms and conditions of the original sale and purchase agreement (the principal agreement) (see bundle B1 pp. 45-59).

[23] There appeared cracks as set out in paras. 16-18 of the plaintiffs' statement of claim and despite attempts to rectify the same the cracks continue to appear and have been recurring;

[24] The plaintiffs attempted to take remedial action on its own in respect of these cracks and carried out extensions on their own in 2007, but the cracks continued to recur and are continuing;

[25] The plaintiffs reside in the said property.

The Plaintiffs' Pleaded Case Against The First Defendant

[26] The plaintiffs' claim against the first defendant is grounded on a breach of contract ie, a breach of cl. 14 of the principal agreement (see p. 21 of first defendant's core bundle) to build the said property in a good and workman like manner. In the amended statement of claim of the plaintiffs the particulars of breach have been set out under the principal agreement. Clause 14 of the principal agreement is set out as follows:

Materials and workmanship to conform to description

14. The said Building shall be constructed *in a good and workmanlike manner in accordance with the description set out in the Fourth Schedule hereto and in accordance with the plans approved by the Appropriate Authority as in the Schedule, which descriptions and plans have been accepted and approved by the Purchaser*, as the Purchaser hereby acknowledges. No changes thereto or deviations therefrom shall be made without the consent in writing of the Purchaser except such as may be required by the Appropriate Authority. The Purchaser shall not be liable for the cost of such changes or deviations and in the event that the changes or deviations involve the substitution or use of cheaper materials or the omission of works originally agreed to be carried out by the Vendor the Purchaser shall be entitled to a corresponding reduction in the purchase price herein or to damages, as the case may be. (emphasis added)

[27] Clause 21 of the principal agreement states that:

The vendor shall, in relation to the said Building to be erected, conform to the provisions and requirements of any written law for the time being in force affecting the said housing development and shall keep the Purchaser indemnified against all fines, penalties or losses incurred by reason of any breach of the provisions of any written laws. (emphasis added)

[28] In the case of *Plant Construction Limited v. JMH Construction Services Limited and Another* (2000) 2 TCLR 513, good and workmanlike manner was said to mean:

... contractor will perform his contract with the skill and care of an ordinarily competent contractor in the circumstances of the actual contractor ... the factual extent of the performance which this term requires will depend on all relevant circumstances, which may vary enormously.

[29] I also refer to the unreported case of *Kiing Teck Hoon v. T-Point Aluminium Sdn Bhd & Ors* [2007] 1 LNS 281; [2007] MLJU 37 and to the judgment of His Lordship Linton Albert J and I quote:

... in order to establish the pleaded claim it must be shown that the shop house was not constructed in a workman like manner in accordance with its building plans drawings and specifications.

I do not think that the case of *Billyack v. Leyland Construction Co. Ltd.* [1968] 1 WLR 471 an authority cited by learned Counsel for the Plaintiff is of any assistance in the particular circumstances of this case. In that case it was held that the words "and in accordance with specification hereto annexed" were not sufficiently clear to impose any limitation on the obligation to build and complete a dwelling-house in a workmanlike manner (see headnote). The relevant clause in the building agreement was clause 1 which read:

> build and complete in a workmanlike manner and in accordance with the specification hereto annexed. ...
>
> There is no such ambiguity in the present case because the obligation to build the shophouse in a workmanlike is explicitly limited by the words "in accordance with the building plans drawings and specifications ..." in that it is neither qualified nor disjointed by the inclusion of the word "and" as in *Billyack*.

[30] In the present case it is evident that the said property was completed within the stipulated period of time under the principal agreement and a certificate of fitness for occupation was issued dated 27 September 2005 (see pp. 69-71 bundle B2) and (see also Form E p. 38 bundle B2). This was in accordance with cl. 25 of the said principal agreement set out below and I quote:

> Vendor to obtain the Certificate of Fitness for Occupation
>
> 25. The Vendor shall, pursuant to the application for the Certificate of Fitness for Occupation under sub clause 24(1) at its own cost and expenses, *duly comply with all the requirements of the Appropriate Authority which are necessary for the issuance of the Certificate of Fitness for Occupation in respect of the said Building*. (emphasis added)

[31] The issue of the certificate of fitness of occupation will point compliance and satisfaction of cl. 14 ie, that the said property had been constructed in a good and workman manner in accordance with the description set out in the fourth schedule of the principal agreement and in accordance with plan approved. And I refer to the case of *Pentadel Sdn Bhd v. TPPT Sdn Bhd* [2011] 1 LNS 1283, wherein Her Ladyship Hadhariah found at p. 6 of her judgment and I quote with approval:

> Under a construction contract, a certificate issued by the relevant authorities certifying the works had been completed *prima facie* proof that that the works had been completed.

[32] Reference is made to cl. 24 of the principal agreement read together with cl. 21 which is set out below:

> 24. (1) Upon the issuance of a Certificate by the Vendor's architect certifying that the construction of the said Building has been duly completed and the water and electricity supply are ready for connection to the said Building and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority in compliance with the relevant provisions of the Uniform Building By-Laws 1984 and the Purchaser having paid all monies payable under subclause 4(1) in accordance with the 3rd Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the purchaser into possession of the said Property.

(2) The delivery of vacant possession by the Vendor shall be supported by:

(a) a certificate signed by the Vendor's architect certifying that the said Building has been duly constructed and completed in accordance with all relevant Acts, by-laws and regulations and that all conditions imposed by the Appropriate Authority in respect of the issuance of the Certificate of Fitness for Occupation have been duly complied with; and

(b) a letter of confirmation from the Appropriate Authority certifying that the Form E as prescribed under the 2nd Schedule to the Uniform Building By-Laws 1984 has been duly submitted by the Vendor and checked and accepted by the Appropriate Authority.

(3) Such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Property until such time as the Certificate of Fitness for Occupation for the said Building is issued.

(4) Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Property, whether or not the Purchaser has actually entered into possession or occupation of the said Property, the Purchaser shall be deemed to have taken delivery of vacant possession.

[33] The court is of the view that all the evidence and documents point to the irresistible conclusion that the said property had been constructed in a good and workmanlike manner in accordance with the relevant laws and regulations. The first defendant has delivered vacant possession of the said property with *inter alia* the support of a certificate signed by the first defendant's architect (see p. 38 bundle B2) certifying that the said property been duly constructed and completed in accordance with all relevant acts, by-laws and regulations and that all conditions imposed by the appropriate authority in respect of the issuance of the certificate of fitness for occupation had been duly complied with.

[34] The plaintiffs' expert reports whilst dealing with the issue of cracks, does not focus on the first defendant's obligations under cl. 14. Whilst the findings might be relevant in support of a plea for breach of duty, alas since the plaintiffs relies by way of its pleading on a breach of cl. 14 of the principal agreement, the report is of little assistance to the plaintiffs.

[35] It is therefore the view of the court that the first defendant had complied with its contractual obligations under cl. 14 of the principal agreement. Counsel for the plaintiffs urges the court to imply into the principal agreement a term that the said property would be delivered by the first defendant to the plaintiffs in a state that would not cause concern for the safety of the plaintiffs in respect of life and limb and that the plaintiffs would enjoy quiet enjoyment of the said property. The plaintiffs in its pleadings have raised a plea of implied terms to be read into the principal agreement, but have failed to expressedly plead particulars of these implied terms that

they are relying on. The court in setting up what the plaintiffs alleges as implied terms, extracted the same from the plaintiffs' submission. I refer to a decision of the Singaporean High Court in *Chan Chor Tng & Ors v. Housing & Urban Development Co (Pte) Ltd* [1980] 1 LNS 101; [1981] 2 MLJ 298 at p. 300 where His Lordship Wee Chong Jin CJ said and I quote with approval:

> The plaintiffs' case is that in each of their respective contracts a term will be implied that the defendants will develop Amber Estate, insofar as the sitting, positioning and orientation of the buildings to be erected thereon, in accordance with the Layout Plan at page 10 of the defendants' Brochure (Exhibit A). In my judgment there is no such implied term or condition in any of the contracts in question. The test to be applied is as formulated by MacKinnon L.J. in *Shirlaw v. Southern Foundries* [1939] 2 KB 206, 227 which reads as follows:
>
> > *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!".

[36] If in this case the officious bystander were to be asked whether these terms were to be implied in the principal agreement, it is the view of the court that the answer would be that so long as the said property was built according to the building plans and specifications set out in the principal agreement and certificate of fitness for occupation had been issued, there would be no need to imply terms into the principal agreement. The plaintiffs rely on the case of *Teh Khem Ori & Anor v. Yeoh & Wu Development & Ors* [1995] 3 MLRM 875 to support their contention. This case is distinguishable as the principal agreement in our case is a statutory one where the law will not permit implied terms to be read into it. I refer to the decision of the Federal Court in *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 at pp. 311-312; [1982] 2 MLJ 31 at p. 34 and I quote with approval the judgment of Tun Suffian LP (as he then was):

> Thus it is clear that only terms and conditions designed to comply with the requirements of the rules that may be Inserted in a contract of sale of land that is governed by the Act and rules, and that on the contrary terms and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted.
>
> With respect, the provisions in question here are similar to those in *Johnson v. Moreton* [1978] 3 All ER 37, a House of Lords decision, where at page 49 Lord Hailsham said:
>
> > The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength. (line a).

A The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament - as was attempted here - where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there B is a public as well as a private interest. (lined onwards).

It would appear that only "contracting out" in favour of the weaker party - i.e. the purchaser - might be countenanced by the courts.

The construction we place on the rules is not as harsh as it seems to a developer - for he has a safeguard in subrule (2) of rule 12 which provides: C

> Notwithstanding the provisions of paragraph (1) of this Rule, where the Controller [of Housing] is satisfied that owing to special circumstances the compliance with any provisions of this Rule is impracticable or unnecessary he may by a certificate in writing waive or modify such provisions in respect of any contract of sale.

D Thus in the circumstances of this case it would have been open to the developer to try and persuade the Controller to modify the rigours of paragraphs (o) and (r) of rule 12(1). If it had succeeded it would have escaped liability. But it made no attempt to do so.

E But Mr. Chelliah says that under the terms of rule 12(2) the developer could have done so only before a contract of sale had been finalized and not after. With respect we do not agree; in our judgment it is open to a developer to take advantage of this provision after as well as before such a contract has been finalized.

For the reasons given above, we are of the opinion that clause 32, being F inconsistent with rule 12 and not designed to comply with the requirements of the rules and in the absence of waiver or modification by the Controller of Housing under rule 12(2), is void, and that therefore the developer is liable in damages for the delay in completion.

[37] It is my judgment that a plea of implied terms cannot be sustained in G a statutory sale and purchase agreement. This court had occasion to consider the issue in an unreported decision in the case of *Ng Hean Yin & Ors v. Ken Property Sdn Bhd* [2013] 1 LNS 1424, where the court found implied terms could not find its way into a statutory agreement and the decision was upheld by the Court of Appeal.

H **[38]** The certificate of practical completion had been issued which implied compliance with cl. 14 of the principal agreement. It follows a plea for breach of the principal agreement cannot be sustained.

[39] The court would adopt the reasoning of the Singaporean High Court referred to earlier aforesaid. In the light of that, finding, I would dismiss the I plaintiffs' claims against the first defendant with costs.

Pleaded Case Against The Second Defendant

[40] From the statement of claim, the crux of the plea against the second defendant is to be found in para. 5.1 of the statement of claim (see p. 42 of bundle Al) and the particulars of negligence have been set out. The fact whether or not the second defendant has been negligent in his role, duties and responsibilities to the first defendant have no bearing to the plaintiffs' claim as no duty of care is owed by the second defendant in that regard. As to the second defendant's role as structural engineer to the plaintiffs for the extension, the relief sought is an indemnity against any contribution ordered by this court in respect of execution of works associated with the extension. Since this court has dismissed the plaintiffs' claim against both defendants, no question of indemnity arises in respect of contribution and the plaintiffs' claim against the second defendant as pleaded should stand dismissed (see p. 46 of bundle Al).

[41] The court can only proceed based on the pleaded case before it. (See *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490, a decision of the Supreme Court).

[42] As it is customary, counsels chose to argue the issue of costs orally after delivery of my decision on liability. The court took into account their respective arguments as to the order for costs the court should make. However taking into account the fact that the plaintiffs now left high and dry with a house that suffers from cracks, the court is of the view that the most just order under these circumstances would be to make no order as to costs.

[43] In the light of the aforesaid, the second defendant's third party action against the third party consequently is also dismissed with no order as to costs. On the upshot the court:

(i) Dismisses the plaintiffs' claim against both defendants with no order as to costs;

(ii) The second defendant's third party action against the third party is dismissed with no order as to costs.